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IN THE
COURT OF APPEALS OF INDIANA

TIMOTHY J. RYON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A05-0608-CR-457
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Evan D. Goodman, Judge
Cause No. 49F15-0503-FD-020356

May 30, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Judge

Timothy J. Ryon appeals his conviction for criminal mischief as a class D felony.[1] Ryon raises two issues, which we restate as:

I. Whether a variance between the charging information and the evidence produced at Ryon's trial is fatal; and

II. Whether the evidence is sufficient to sustain his conviction for criminal mischief as a class D felony.

We affirm.

The facts most favorable to the conviction follow. On November 22, 2004, Jeremy Gayde, Daniel Michael, Wes Snyder, and Dan Shipley were riding their motorcycles on Interstate 465 in Indianapolis. A truck driven by Ryon's brother passed the motorcycles in the emergency lane and then swerved in front of the motorcycles. The men followed the truck, which exited the interstate. Shipley then passed the truck, and the truck hit the back tire of Shipley's motorcycle. The truck stopped briefly on Ingomar Street, where Ryon ran out of a nearby house and began yelling at the men.

As Gayde was attempting to drive away, Ryon ran off of his porch, swung at Gayde with his fist, and pushed or hit the back of Gayde's motorcycle. Gayde lost control of the motorcycle and fell onto the pavement. Ryon then returned to his front porch and said, "I didn't touch him, I didn't push him." Transcript at 42.

The State charged Ryon with criminal mischief as a class D felony. The charging information alleged that Ryon "did without the consent of [Gayde], recklessly or

[1] Ind. Code § 35-43-1-2 (2004) (subsequently amended by Pub. L. No. 140-2006, § 33 (eff. July 1, 2006), and Pub. L. No. 173-2006, § 33 (eff. July 1. 2006)).

knowingly damage that person's property to wit a motorcycle, by striking it with an object and caused a pecuniary loss of at least $2,500." Id. at 13. At the jury trial, Gayde and Michael testified that Ryon either pushed or hit the back of Gayde's motorcycle. Ryon testified that he swung at Gayde but missed and that he did not touch Gayde or his motorcycle. Ryon admitted that he had keys in his hand when he swung at Gayde. The jury found Ryon guilty as charged, and the trial court sentenced him to 270 days in jail with 260 days suspended to probation.

I.

The first issue is whether a variance between the charging information and the evidence produced at Ryon's trial is fatal. A variance is an essential difference between proof and pleading. Childers v. State, 813 N.E.2d 432, 436 (Ind. Ct. App. 2004). Not all variances between allegations in the charge and the evidence at the trial are fatal. Id. The test to determine whether a variance is fatal is as follows:

> (1) was the defendant misled by the variance in the evidence from the allegations and specifications in the charge in the preparation and maintenance of his defense, and was he harmed or prejudiced thereby;
>
> (2) will the defendant be protected in the future criminal proceeding covering the same event, facts and evidence against double jeopardy?

Id. However, the failure to make a specific objection at trial waives any material variance issue. Id.

Here, Ryon did not make a specific objection at trial to the variance between the charging information and the evidence presented at trial. Consequently, Ryon has waived

this issue. See, e.g., id. (holding that the defendant waived a variance by failing to object at trial).

Waiver notwithstanding, we conclude that any variance between the pleading and the proof does not require reversal. Although the information alleges that Ryon damaged Gayde's motorcycle "by striking it with an object," the evidence presented at the trial revealed that Ryon either hit or pushed the back of Gayde's motorcycle. Appellant's Appendix at 18; Transcript at 41, 86. However, Ryon also admitted that he had keys in his hand when he swung at Gayde. Thus, it is not altogether clear that there is a variance between the pleading and the evidence presented at trial.

However, to the extent that there is a variance, we note that the use of an object to strike Gayde's motorcycle was not an element of the offense. See Ind. Code § 35-43-1-2 (providing that a person who "recklessly, knowingly, or intentionally damages or defaces property of another person without the other person's consent" commits criminal mischief). "The general rule of Indiana criminal procedure is that 'what is unnecessary to allege is automatically unnecessary to prove.'" Mitchem v. State, 685 N.E.2d 671, 676 (Ind. 1997) (quoting Powell v. State, 250 Ind. 663, 668, 237 N.E.2d 95, 98 (1968)). "Allegations not essential . . . which can be entirely omitted without affecting the sufficiency of the charge against the defendant, are considered as mere surplusage and may be disregarded." Id. "Unnecessary descriptive material in a charge is surplusage. It need not be established in the proof and if there is a variance in the evidence from such unnecessary particularity it does not vitiate the proceedings unless it is shown that the

defendant has been misled or prejudiced thereby." Id. (quoting Madison v. State, 234 Ind. 517, 543-44, 130 N.E.2d 35, 47 (1955) (concurring opinion of Arterburn, J., in which three other justices concurred)). The allegation that Ryon hit Gayde's motorcycle with an object was mere surplusage. Moreover, Ryon's main defense was that he did not touch or push Gayde's motorcycle. We cannot say that Ryon was misled or prejudiced by any variance between the charging information and the evidence presented. See, e.g., Wessling v. State, 798 N.E.2d 929, 937-938 (Ind. Ct. App. 2003) (holding that a variance between the charging information and the evidence presented at trial regarding which specific blow to the victim caused his death was not fatal).

II.

The next issue is whether the evidence is sufficient to sustain Ryon's conviction for criminal mischief as a class D felony. When reviewing claims of insufficiency of the evidence, we do not reweigh the evidence or judge the credibility of witnesses. Jordan v. State, 656 N.E.2d 816, 817 (Ind. 1995), reh'g denied. Rather, we look to the evidence and the reasonable inferences therefrom that support the verdict. Id. We will affirm the conviction if there exists evidence of probative value from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. Id.

The offense of criminal mischief is governed by Ind. Code § 35-43-1-2, which provides that a person who "recklessly, knowingly, or intentionally damages or defaces property of another person without the other person's consent" commits criminal mischief. The offense is a class D felony if the pecuniary loss is at least two thousand

five hundred dollars ($2,500). I.C. § 35-43-1-2(a)(1)(B). Ryon argues only that the State failed to prove that he struck Gayde's motorcycle with an object. We addressed that argument above. See supra Part I.

The evidence favorable to the conviction shows that Ryon either pushed or hit the back of Gayde's motorcycle causing Gayde to wreck and sustain over $4,000.00 in damage. Ryon admitted that he had keys in his hand at the time. We conclude that the State presented evidence of probative value from which the jury could have found Ryon guilty of criminal mischief as a class D felony. See, e.g., McGuire v. State, 625 N.E.2d 1281, 1282 (Ind. Ct. App. 1993) (holding that the evidence was sufficient to sustain the defendant's conviction for criminal mischief where he threw a beer bottle at a vehicle during an argument and dented the vehicle).

For the foregoing reasons, we affirm Ryon's conviction for criminal mischief as a class D felony.

Affirmed.

SULLIVAN, J. and CRONE, J. concur